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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

PETER CRAWFORD, *et al.*,
Petitioners,

v.

AIR LINE PILOTS ASSOCIATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Air Line Pilots Association (ALPA) respectfully submits this brief in opposition to the petition for certiorari. As we shall show, two of the issues raised in the petition were decided by the court below in a manner completely consistent with this Court's decision in *Lehnert v. Ferris Faculty Ass'n*, 111 S.Ct. 1950 (1991), and do not warrant plenary review. The remaining issue, relating to litigation costs, was not decided below at all, because the court of appeals concluded that it "simply has not been properly presented and preserved below, and therefore we express no view about it." (App. 10a). Certainly this Court need not concern itself with an issue that was not even decided in this case.

COUNTERSTATEMENT OF THE CASE

Nature of the Action

Petitioners in this case are 42 airline pilots who, at the time this case was filed, were employed by nine different airlines. Respondent ALPA is a national labor organization which represents the pilots on most of the nation's commercial airlines, including those on which petitioners were employed. ALPA's collective bargaining agreements with petitioners' airlines (as well as most others) included an "agency shop" provision requiring pilots who chose not to be members of ALPA to pay a service charge equivalent to ALPA's initiation fees, dues and (under some agreements) assessments.

Petitioners, who were not ALPA members, brought this action in the United States District Court for the Eastern District of Virginia to challenge ALPA's administration of its agency shop agreements. Their complaint was in two counts. First, it alleged that ALPA had failed to provide the procedural safeguards prescribed by this Court's decision in *Chicago Teachers Union, Local No. 1 v. Hudson,* 475 U.S. 292 (1986). Petitioners have now abandoned this claim. Second, the complaint alleged that ALPA had improperly used petitioners' agency fees, over their objection, (1) to support strikes and bargaining activities at airlines other than those where petitioners were employed, and (2) to fund a "Major Contingency Fund" which ALPA had established to provide a reserve for major labor disputes and similar financial crises. Petitioners contended that, under this Court's decision in *Ellis v. Brotherhood of Ry. Clerks,* 466 U.S. 435 (1984), these were activities to which they should not be required to contribute.

Plaintiffs objected in particular to having to contribute to the costs of ALPA strikes at Continental and United Air Lines, but their basic contention was that they should not be required to pay any costs relating to collective bargaining at any airline other than their own.

Decision of the District Court

The case was submitted to District Judge Albert V. Bryan, Jr. largely on the basis of stipulated facts and exhibits, supplemented by oral testimony presented at a one-day trial. On March 25, 1988, Judge Bryan issued a Memorandum Opinion (App. 60a-66a), in which he incorporated by reference the parties' stipulation (App. 67a-82a).

Paragraphs 8 and 9 of the stipulation described how ALPA manages and conducts its collective bargaining:

> 8. ALPA's collective bargaining activities are to a large extent directed and coordinated by its national officers and governing bodies. Broad bargaining goals and policies are established by ALPA's Board of Directors and Executive Board, and are binding on the entire organization. A standing committee of the Executive Board, known as the Collective Bargaining Committee, conducts an ongoing study of a wide range of matters relating to collective bargaining, collects and publishes all of ALPA's collective bargaining policies, and recommends changes in those policies.
>
> 9. Under Article XVIII of ALPA's Constitution and By-Laws, all collective bargaining negotiations and agreements must be approved by its President. The actual negotiations at each airline are conducted by a Negotiating Committee selected by the MEC [Master Executive Council] at that airline, and are assisted by a professional negotiator employed in ALPA's Representation Department who reports regularly to the President on the progress of such negotiations. There are periodic conferences of all Negotiating Committee Chairmen at which they exchange information on what is happening at their respective airlines and receive briefings from ALPA's national officers and staff. ALPA also has a staff of economic and financial analysts who collect data and perform studies relevant to collective bargaining, as well as a staff of pension and insurance experts to assist in the

> administration and negotiation of agreements relating to retirement and insurance benefits.

(App. 70a).

The stipulation also described the collective bargaining disputes that led to the strikes at Continental and United Air Lines, toward which plaintiffs particularly objected to contributing. (App. 70a-72a). Based on the stipulated facts, as well as the oral testimony presented at trial, the district court found that these disputes affected labor relations throughout the airline industry:

> The uncontroverted testimony . . . establishes that collective bargaining negotiations at any one airline are directly affected by, and also directly affect, negotiations at all other airlines. Each airline strives to keep its labor costs no higher than those of its competitors. Thus, when one airline obtains some cost-cutting concession from ALPA, other airlines generally seek to obtain the same or an equivalent concession. On the other hand, when ALPA succeeds in negotiating a wage or benefit increase with one airline, that enhances its ability to negotiate a similar increase with other airlines.
>
> Consequently, it was important to ALPA, in the interests of all the pilots which it represented, to ensure that what had happened at Continental, namely, a bankruptcy whereby the collective bargaining agreement was abrogated and pilots' salaries were cut in half, not become an industry norm to be sought by other airlines in the bargaining process. For this reason, it was in the interest of all pilots, members and non-members alike, that ALPA use its funds to pay the [striking] pilots at Continental to make up for their lost wages.
>
> Similarly, in 1985, United sought in bargaining to impose a concession which American Airlines had achieved, namely, a B-scale two-tier payment arrangement under which airline cockpit personnel hired after a certain date would be paid on a lower

> pay scale (the B-scale). ALPA supported financially the pilots who struck United, and ultimately, after a twenty-nine day strike, secured from United a six year parity requirement under the B-scale arrangement. This accomplishment has been used to benefit all members (and non-members) in all the airlines, not just those employed by United.

(App. 64a-65a).

Finally, the stipulation and trial testimony dealt with the nature and purpose of ALPA's "Major Contingency Fund". Based on this evidence, the district court found:

> The United and Continental strikes considerably weakened ALPA's financial stability. Since a financially weak ALPA was vulnerable to a prolonged strike, ALPA lost its credibility with management because the other airlines knew it could not financially sustain a long strike. For this reason, the Major Contingency Fund was created with a concomitant increase in [ALPA's] annual membership dues from 1.35% to 2.35% of each member's airline earnings. It was from this fund that some expenditures, beginning in 1985, were made to support the striking pilots at Continental and United. Plaintiffs attack the fund as an improper expenditure of the dues of the objecting plaintiffs. Again the court finds the creation of the fund to be a device reasonably employed to implement the duties of the union as exclusive representative of the employees in the bargaining unit.

(App. 65a).

Based on these findings, the district court concluded that the challenged expenditures met the standard of chargeability articulated by this Court in *Ellis*, 466 U.S. at 448, because they were for "activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit." (App. 63a, 65a-66a).

The Proceedings on Appeal

Petitioners appealed to the United States Court of Appeals for the Fourth Circuit. Their brief on appeal stated the issues presented with respect to Count 2 of the complaint as follows:

> Whether the district court—in deciding plaintiffs' Second Claim for Relief—erred in its interpretation of the U.S. Supreme Court decision in *Ellis* by holding:
>
> > (5) that nonunion pilots could be compelled to financially support ALPA strikes and activities in support of other bargaining units (Op. 6-8, App. 75-77); and
> >
> > (6) that nonunion pilots could be compelled to contribute to ALPA's one-hundred million dollar "contingency fund" (Op. 9, App. 78).[1]

(Petitioners' Court of Appeals Brief, pp. 2-3).

The case was initially argued before a three-judge panel, which issued a unanimous decision on March 19, 1989, affirming the district court's judgment. (App. 47a-59a). Petitioners then filed a petition for rehearing in banc, which was granted by the court. The case was reargued before the court in banc on October 3, 1989.

On June 11, 1990, this Court granted certiorari in *Lehnert v. Ferris Faculty Ass'n*, 110 S.Ct. 2616, *decided on the merits*, 111 S.Ct. 1950 (1991). The petitioners in that public sector case contended, as do petitioners here, that their bargaining representative "may not utilize dissenters' fees for activities that, though closely related to collective bargaining generally, are not undertaken directly on behalf of the bargaining unit to which the objecting employees belong." 111 S.Ct. at 1959 (1991).

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[1] These issues are numbered (5) and (6) because they were preceded by four other questions presented, numbered (1) through (4), relating to Count 1 of the complaint, which petitioners have now abandoned.

On June 27, 1990, the court of appeals entered an order deferring further action in the present case pending this Court's decision in *Lehnert*.

This Court issued its decision in *Lehnert* on May 30, 1991, holding "that a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit." 111 S.Ct. at 1961. The court of appeals then requested the parties to file supplemental briefs discussing the impact of *Lehnert* on the present case. After those briefs were filed, the court scheduled another in banc oral argument in February 1992 (perhaps because three new judges had been appointed since the 1989 argument).

The court of appeals issued its in banc decision on April 28, 1993. Both the majority opinion, written by Judge Butzner, and the concurring opinion, written by Judge Wilkinson, held that the case was controlled by *Lehnert*. As Judge Wilkinson put it:

> I vote to affirm the district court's judgment because I believe that we are required by *Lehnert v. Ferris Faculty Association*, 111 S.Ct. 1950 (1991), to do so. Judges are in the business of taking language seriously, and the language in *Lehnert* nails the result here to the mast.

Judge Russell dissented, in a lengthy opinion joined by four other judges. The dissent made three basic arguments:

(1) That some of ALPA's expenditures in connection with the Continental and United strikes were for litigation, and those costs should not have been charged to the plaintiffs.[2]

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[2] The majority had refused to address the issue of litigation costs, because "nowhere in appellants' complaint, the stipulation of fact, or the district court's findings is there any mention of extra-

(2) That some of the expenditures from the Major Contingency Fund had been for strike preparations at Eastern Airlines, and no evidence had been presented to show that the dispute at Eastern had any relationship to collective bargaining at petitioners' airlines.

(3) That the holding of *Lehnert* with respect to the chargeability of collective bargaining costs at other bargaining units is inapplicable to the costs of ALPA's strikes against Continental and United. The *Lehnert* rule is limited to "nonideological" costs, and the Continental and United strikes were not "nonideological" because they involved communications "directed outside the union." (App. 43a).

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE DECISION BELOW IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISION IN *LEHNERT*.

Contrary to the views expressed by petitioners and by the dissenting opinion below, the decision in this case is entirely consistent with this Court's decision in *Lehnert*. In *Lehnert*, as here, nonunion employees contended that they should not be compelled by an agency shop agreement to pay for union activities "that, though closely related to collective bargaining generally, are not undertaken directly on behalf of the bargaining unit to which the objecting employees belong." 111 S.Ct. at 1959. This Court, while divided over other issues in the case, was unanimous in its rejection of this contention. All of the opinions in *Lehnert* agreed that a national union can use agency fees collected from many bargaining units to finance its collective bargaining activities in all of those units, even if, in any particular year, some bargaining units will contribute more to the union's "pool of re-

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unit litigation expenses in this case. The issue simply has not been properly preserved below, and therefore we express no view about it." (App. 10a).

sources" than they receive in direct benefits from it. Justice Blackmun's opinion explained:

> The essence of the affiliation relationship is the notion that the parent will bring to bear its often considerable economic, political, and informational resources when the local is in need of them. Consequently, that part of a local's affiliation fee which contributes to the pool of resources potentially available to the local is assessed for the bargaining unit's protection, even if it is not actually expended on that unit in any particular membership year.
>
> * * * *
>
> We therefore conclude that a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employees' bargaining unit. This conclusion, however, does not serve to grant a local union carte blanche to expend dissenters' dollars for bargaining activities wholly unrelated to the employees in their unit. . . . There must be some indication that the payment is for services that may ultimately enure to the benefit of the members of the local union by virtue of their membership in the parent organization. . . . We conclude merely that the union need not demonstrate a direct and tangible impact upon the dissenting employee's unit.

111 S.Ct. at 1961-62.

The separate opinion of Justice Scalia, while disagreeing with the majority on various other issues, agreed with this aspect of the majority opinion. 111 S.Ct. at 1980-81.

As the court below held, the result in the present case follows naturally from *Lehnert*:

> ALPA's "unified-membership structure," 111 S.Ct. at 1961, is even tighter than that of the union in *Lehnert*. As the district court found, negotiations at other airlines were not only germane to the bargain-

> ing process at each airline bargaining unit, but in essence determined the result of the bargaining process. Expenditures to prevent extraction of concessions from ALPA by individual airlines handily meet the *Lehnert* test. Because support for the striking pilots was of crucial importance in establishing the union's bargaining position at each airline unit, the requirement that agency-fee objectors provide funds for the strike benefits was clearly justified by the bargained pattern and practice in the airline industry.

(App. 9a).

Petitioners accuse the court of appeals of having abandoned the standard that chargeable expenses must be "germane to collective bargaining," in favor of a requirement that the expenditure "enure to the benefit of the members of the local union by virtue of their membership in the parent organization." (Petition 15-16). In fact, both the district court and the court of appeals found the challenged expenditures to be "germane to collective bargaining," as the above excerpt from the court of appeals opinion makes clear.[3]

Judge Russell's novel argument that strikes must be considered "ideological" activities because they have "communicative content" directed outside the union is unconvincing. (App. 43a). While all union activities may be said to have some ideological dimension, strikes are pri-

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[3] Petitioners also argue that, "[w]hatever the appropriate test for determining the chargeability of the Continental and United strike expenditures, . . . ALPA's extra-unit donation of $1,100,000 to another union participating in the United strike can never be chargeable to objecting employees." (Petition 16). Petitioners never previously challenged this specific expenditure, so neither the district court nor the court of appeals addressed it. The sum in question was paid by ALPA to reimburse the United Air Lines flight attendants and their union for losses and expenses incurred as a result of their honoring ALPA's picket lines during its 1985 strike against United. This payment was part of the cost of the strike, and was just as "germane to collective bargaining" as any other strike expense.

marily an economic, not an ideological, activity, intended to bring pressure on the employer to accede to a union's bargaining demands. As such, they are an integral part of collective bargaining. It is hard to imagine any union activity more "germane" to collective bargaining than a strike that is called to break an impasse in collective bargaining negotiations.

Petitioners also contend, echoing another argument made by Judge Russell's dissent, that the court below "erred in upholding the chargeability of ALPA's 'extra-unit' expenditures in support of Eastern strike activity, i.e. 1986-87 strike preparations and the 1989 sympathy strike in support of another union." (Petition 16). They complain that ALPA "failed to present any evidence or proof that such expenditures were germane to collective bargaining." (*Id.*). It is not surprising that there was no evidence in this case concerning the "1989 sympathy strike" at Eastern, because the trial of this case took place in March 1988, more than a year before that strike began. Moreover, the issues in this case concerned ALPA's expenditures in 1985 and 1986. Thus, the 1989 Eastern strike was simply never in issue in this case.

The evidence did show that ALPA's *1986* expenditures from the Major Contingency Fund, which *were* in issue, included $3.4 million for Eastern strike preparations. (Court of Appeals Appendix 121). Those 1986 expenditures, however, were unrelated to the 1989 strike. ALPA's 1986 Rebate Report explained that these strike related expenses were incurred in 1986 in connection with the Eastern Airlines crisis, *where a strike was only narrowly averted.*" (*Id.* 98, emphasis added). The events at Eastern were not further discussed at trial, or in the opinion of the district court, because petitioners' attack was focused on the more costly Continental and United strikes.

The basic issue in this case was not whether petitioners could be charged with the costs of this or that specific strike, but whether they could be charged with *any* bar-

gaining or strike-related expenses at *any* airline other than their own. Based on all the evidence presented at trial, the district court ultimately found "that collective bargaining negotiations at *any* one airline are directly affected by, and also directly affect, negotiations *at all other* airlines." (App. 64a (emphasis added)). Petitioners never seriously contested this proposition. Rather, they argued that, as a matter of law, they could not be compelled to pay any collective bargaining costs incurred outside their respective bargaining units. That argument was put to rest by this Court's decision in *Lehnert*.

II. THE CHARGEABILITY OF LITIGATION COSTS WAS NEITHER PROPERLY RAISED NOR DECIDED IN THE COURTS BELOW.

Petitioners also ask this Court to review the court of appeals' refusal to consider the issue of whether ALPA's litigation costs at other airlines were properly chargeable to petitioners. The court of appeals declined to decide this issue because it "has not been properly presented and preserved below." (App. 10a). Even if this procedural ruling were wrong, it is hardly the kind of error that warrants review by writ of certiorari. In any event, we believe the court was correct.

Petitioners made no contention specifically directed to litigation costs either in their complaint, their arguments to the district court, or their initial brief on appeal. The issue was first discussed in the parties' *supplemental* briefs, which were filed at the request of the court of appeals at the rehearing stage, after this Court issued the *Lehnert* decision.

It is true that plaintiffs challenged ALPA's expenditures for the United and Continental strikes, and that some of those expenditures were for strike-related litigation. But petitioners' arguments did not differentiate between litigation expenses and all other expenses incurred outside their bargaining unit. Thus, neither ALPA nor the courts be-

low had any reason to believe that litigation costs, per se, were at issue. None of the cases cited by petitioners or by Judge Russell's dissent relieve a plaintiff of his normal obligation to identify, through appropriate pleadings and arguments, the legal and factual issues he wishes the court to consider and decide.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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